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Supreme Court, U.S.
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No. 86-1671

IN THE SUPREME COURT OF THE UNITED STATES
1987 Term

JAMIE E. COKER,
Petitioner

v.

R. A. GIELOW, Chairman of the
Railroad Retirement Board, et al.,
and
the UNITED STATES RAILROAD
RETIREMENT BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S WRIT OF CERTIORARI SUPPLEMENTAL BRIEF and SUPPLEMENTAL APPENDIX IN SUPPORT

JAMIE E. COKER, pro se
1031 Gloria Road
Memphis, TN 38116
(901) 398-1234

No. 86-1671

IN THE SUPREME COURT OF THE UNITED STATES

JAMIE E. COKER,
Petitioner

v.

R. A. GIELOW, Chairman of the
Railroad Retirement Board, et al.,
and
the UNITED STATES RAILROAD
RETIREMENT BOARD

TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL ARGUMENT

In 1982, Petitioner began making appeals to the Railroad Retirement Board about the annuity paid him under the 1974 Tiering System instead of as the Law required under the 1937 Act, which was the Act he retired under when he left the railroad prior to 1971. On October 18, 1983, the Board granted a hearing on his appeal, which Petitioner blindly accepted as required under Federal Law and Regulations. To the contrary, the Board has never afforded the Petitioner a hearing which is required under 20 CFR §§ 258 and 259, if there is a dispute concerning the status of the employee relating to which Law Petitioner's annuity should be computed - the 1937 Act or the 1974 Act.

20 CFR § 258.1 Hearings:

> "(a) To such extent as may be necessary to determine (1) the employee status of any individual. . .(3)any other matter arising out of or necessary for the administration of the Railroad Unemployment Insurance Act and the Railroad Retirement Acts of 1935, 1937, and 1974, other than matters specically provided for in Parts 260 and 320 of this chapter, the Board may itself or through one of its members or a designated examiner, conduct hearings, require and compel the attendance of witnesses and the production of records and documents, administer oaths, take testimony, make all pertinent investigations and findings of fact, and render decisions upon such findings.
>
> (b) Where the Board determines that an oral hearing is necessary to the determination of a matter before it, the Board shall notify all parties to the proceeding that a hearing will be conducted, and, if the hearing is to be before a single Board member or a designated examiner, the notice shall identify the member or examiner authorized to conduct the hearing."

The above requirements were not met. Parts 260 and 320 are hearings conducted by an Appeals Referee where the appeals are on reconsiderations of Bureau of Retirement Claims, etc., pertaining to computations only. Attachment 1, pages 1-8, decision of Appeals Referee on the only oral hearing Petitioner had, show the two issues considered were only computations; nothing to do with Law he is under, since the Board has failed to set a hearing to determine the status of Petitioner, whether he should be computed, 1937 or 1974 Act. It was evident during the hearing Ms. Grace Koester, Appeals Referee

had little knowledge of the 1937 Act. She was not aware until Petitioner inquired, there should have been a comparison made of annuity due him under the 1937 Act with amount due under the 1974 Act. She searched through the file and found none. The comparison should have been made, to pay him the higher amount, prior to payment of first annuity check. She said she would include this in her decision, which was not made until some seven months later, May 16, 1984. A-1, pages 7-8 is the comparison attempted by the referee. She computed under the 1937 Law Petitioner was due a railroad pension alone of approximately $309.00 on December 31, 1974, which included no cost-of-living increases and no social security benefits. She compared the $309.00 amount with the $523.98 she computed under the 1974 Act which included all cost-of-living increases from 1975 through 1983 and also included $279.00 in social security benefits. This must be considered by the Court as a most irrational comparison--like comparing apples and oranges. Prior to hearing, calculations had not been furnished Petitioner, other than an award sheet showing the results of calculations, but

not how the amounts were reached. The information did, however, reflect Petitioner's annuity was computed under the 1981 and 1983 Reduction Amendments, not effective until after annuity award was computed and paid. Petitioner has been requesting since 1982 to date that the Board furnish him all of his file, under 5 U.S.C. §552. The Board to date has failed to do this.

20 CFR § 258.5 Exhibits states:

> "Copies of all exhibits admitted in evidence at any hearing held pursuant to the provisions of this part shall be furnished by the party offering the same to all other parties participating in the proceedings."

The referee had Petitioner's file, but failed to make documents available to him. Petitioner held in hand at hearing a pamphlet furnished him by the Union after he left the railroad in 1970. The pamphlet, dated December 1974, was compiled by Bureau of Research for the Railroad Retirement Board. The referee had never before seen the document. She made a copy of it. Petitioner kept reading from it, since it was basically all the documentation he had to substantiate his argument. He felt since the Board had published it, it must be true. It stated:

> "RAILROAD RETIREMENT ACT OF 1974. . .
> A GRANDFATHER CLAUSE guarantees that employees and their wives retiring during the eight years

following the changeover date of January 1, 1975, will receive no less than the amounts that would have been payable under previous law, excluding social security benefits."

The referee kept saying the pamphlet did not mean that, but meant a windfall amount would be paid to partially offset the social security benefits lost. She commented it was regrettable Petitioner had been misled by the pamphlet.(A-1, page 8) It was apparent the referee was very confused about 45 U.S.C. §231b(f)(2), "Grandfather Clause" which guaranteed under the 1974 Law he was to be paid the same amount due him under the 1937 Act, with no provision made for a partial payment as the referee found on page 6 of A-1 "replaces in part". Petitioner was due the same amount paid in one check under the 1974 Act as he would have been paid in two checks under the 1937 Act, as he was a Dual-vested employee with a current connection. 20 CFR § 258.6 states:

"(a) Where an examiner has been designated by the Board under this part to conduct a hearing with respect to a matter before it, the examiner shall preside at the hearing and shall cause all testimony to be recorded. The examiner shall, as soon as practicable following the conclusion of the hearing, mail to each party. . . a free transcript of the record of the proceedings had before the examiner. Thereafter the examiner shall give the parties participating in the hearing the opportunity to present argument upon

> both law and facts. Upon conclusion of the proceedings before him or her, the examiner shall prepare a report which together with the record of the proceedings before him or her shall be submitted to the Board . . .A copy of the examiner's report shall be served by the examiner upon each party [at the hearing]. Each party shall within 10 days. . .file with the Board. . .such exceptions in writing as he or she desires to make to the examiner's findings of fact and conclusions of law. . ."

It is evident, the examiner has the authority to make findings and conclusions of law, which was necessary in Petitioner's case, to determine whether his annuity was to be paid under the 1937 Law or the 1974 Tiering System; while refereee only has authority to make determinations pertaining to computations as A-1 makes clear. Under Parts 260 and 320, there is no requirement for the referee to make available a copy of transcript of hearing. Under §258.6, this is a requirement and was necessary for Petitioner to have to make further appeals. The requirements under §258 and §259 for hearings pertain to the law requiring an examiner capable of making findings pertaining to law; while §260.5 and §320.18 allows the Director of Hearings and Appeals to appoint a referee as it states and further allows -

> ". . . if the Bureau of Hearings and Appeals' caseload dictates, appoint a qualified Board employee, other than a referee assigned to the Bureau of Hearings and Appeals, to act as referee with respect to such a case."

The referee, at the hearing, had full control of the tape recorder. Petitioner was not aware until after he filed PETITION FOR REVIEW to the Sixth Circuit Court of Appeals, October 12, 1985, some two years after the hearing, his testimony on the tape had been blanked out. He did not know until then, the Three-Member Board made its decision without benefit of his testimony. The Board had failed to include in his file, which was secured under 5 U.S.C. §552, February 1985, a copy of the no less than 147 "inaudibles" transcript. He called to the Sixth Circuit Court's attention the "inaudible" transcript but the Court failed to address the issue which denied him his rights under due process. Had he have been given a copy of the "inaudible" transcript" as required under 20 CFR §258.6, he would have had an opportunity to request a Supplemental Hearing. Judgment of the Sixth Circuit Court stated it was made on the transcript of record which would necessarily include the "inaudible" transcript; Petitioner finds this impossible.

20 CFR § 258.7 states:

> "A decision made by at least two members of the Board shall constitute the decision of the Board. The decision of the Board shall be stated in a written opinion filed in the record of the proceedings. A dissenting

> opinion may be stated by a member of the Board who disagrees with the decision of the Board and any such dissenting opinion shall also be filed in the record of the proceedings."

Attachment 2, herein, is a copy of the Board's Decision. The original contained less than four full lines, with "rubber-stamped" signatures affixed thereon, causing Petitioner to question the authenticity of it. This fact was not addressed by the Court; also Petitioner could not appeal the Board's Decision but was required to appeal the referee's decision which should not have been made in the first place; but made by an examiner or the Board pertaining to law. This shows the Board has mishandled his case from the beginning. Part § 259 of Code of Federal Regulations pertains to Appeal of Initial Determination with Respect to. . .Employee Status - which Law petitioner is under, 1937 or 1974. The Appeal of such determination under §259 is made to the Deputy General Counsel of the Board, again pertaining to Law and not computations. Petitioner was denied this appeal process, since the Board has yet to hold a hearing to determine which law he falls under. The Board automatically computed and paid him under the 1974 Tiering System. It has stated both orally and in writing as shown in his file

that all annuitants are put in the computer the same way. Under the 1974 Tiering System, the Board reduces from his Railroad Annuity his FULL Social Security Benefits, leaving him with nothing for the Social Security Retirement Taxes he was required to pay for over 23 years separate and apart from railroad work performed at the same time - or either, after SS of $404.00 is reduced from Railroad $504.80, the railroad only has to pay $100.80 for 23.25 years of railroad work. Under the 1937 Law, Petitioner would have COMBINED his guaranteed railroad pension, 45 U.S.C. §231b(f)(2), plus cost-of-living increases from 1975 forward, plus FULL Social Security Benefits, plus supplemental annuity calculated under 1937 Law at a much higher rate than the $19.18 the Board pays him under the 1974 Act. The Board receives through the Financial Interchange System, by the Secretary of the Treasury and the Social Security Administration, to pay Petitioner each month $243.55 GREATER amount than it pays him.

It is clear the Board has misused the appeal system and has denied Petitioner a fair and just hearing under the required parts of the Code of Federal Regulations. Parts §§258,259 show under AUTHORITY, 45 U.S.C. §228J, the 1937 Law and under SOURCE 43 Federal Register number December

1978, amended November 9, 1983, since 45 U.S.C. § 231b(f)(2), "Grandfather Clause" ceased to be applicable on January 1, 1983, so that Hearings to determine status of employees under 1937 Law were not needed after 1983. Parts §§260,320 show AUTHORITY § 231g, the 1974 Act and SOURCE: August 24, 1982 amended May 9, 1985. It appears that on October 18,1983 when Petitioner's hearing was held the Board had already converted to the Referee System of Hearing and it failed to allow Petitioner his right to a Hearing to determine which law, the 1937 or 1974 Act, he was to be paid under. Since 1983, Petitioner has appealed to the Board, the Three-Member Board, Sixth Circuit Court of Appeals that the Law requires the Board to pay Petitioner under whichever Law he would recieve the higher annuity. This has never been determined because none of the appeals made have addressed the question pertaining to Law only pertaining to computations by the Board. Petitioner has been denied his right under due process. These issues affect thousands of others, depending on annuity checks for their livelihood.

Respectfully submitted,

Jamie E. Coker Arlene C. Coker

1031 Gloria Road
Memphis, TN 38116
(901) 398-1234

JAMIE E. COKER, Petitioner
Arlene C. Coker, Wife and
Attorney-in-Fact

No. 86-1671

SUPPLEMENTAL APPENDIX

DECISION OF THE APPEALS REFEREE

Mr. Jamie E. Coker
1031 Gloria Road
Memphis, Tennessee 38116
May 16, 1984

Decision No. 13,608
Appeal No. 15,127
R.R.B. No. A-721-10-9264

PROCEDURAL HISTORY

On November 10, 1981, the appellant filed an application for a retirement annuity under the provisions of the Railroad Retirement Act. Mr. Coker was found entitled to an annuity effective May 1, 1981. Effective August 1, 1982, Mr. Coker's annuity was reduced because of his entitlement to social security benefits. (The reduction for social security entitlement was subsequently removed because Mr. Coker withdrew his application for social security benefits). In addition, part of Mr. Coker's annuity was withheld due to his earnings in 1981, 1982, and 1983. In April 1983, Mr. Coker filed an appeal from the decision on the amount of his railroad retirement annuity. A hearing was held on his appeal in Memphis, Tennessee on October 18, 1983. The appellant was present at the hearing with his wife, Mrs. Emma Coker. He was represented at the hearing by his attorney, William Gosnell.

ISSUES

There are 2 issues in the appellant's case: 1) Whether his annuity was subject to deductions due to his earnings in 1981, 1982, and 1983; and 2) Whether the amount of his annuity has been properly computed under the provisions of the Railroad Retirement Act.

LAW AND REGULATIONS

Mr. Coker's annuity consists of three components. The first component is provided by section 3(a)(1) of the Act:

> "3.(a)(1) The annuity of an individual under section 2(a)(1) of this Act shall be in an amount equal to the amount (before any reduction on account of age and before any deductions on account of work) of the old-age insurance benefit or disability insurance benefit to which such individual would have been entitled under the Social Security Act if all of his or her service as an employee after December 31, 1936, had been included in the term 'employment' as defined in that Act."

Section 3(b)(1) provides the second component, tier II:

"(b)(1) The amount of the annuity of an individual provided under subsection (a) shall be increased by an amount equal to seven-tenths of 1 per centum of the product which is obtained by multiplying such individual's "years" by such individual's "average monthly compensation" as determined under this subsection. The annuity amount payable to the individual under this subsection shall be reduced by 25 per centum of the annuity amount computed for such individual under subsection (h)(1) or (h)(2), and subsection (h)(5), of this section without regard to section 7(c)(1) of this Act. x x x"

A cost-of-living increase was paid in the tier I effective December 1, 1983. In Public Law 98-76, passed in August 1983, Congress amended section 3(g) to provide a reduction in the tier II portion of an employee annuity. The reduction is not to exceed the cost-of-living increase in tier I. Section 3(g)(2) states:

"(2) The first and, if necessary, the following time or times after January 1, 1983, that monthly insurance benefits under section 202 of the Social security Act are increased, that portion of the annuity of an individual which is computed under subsection (b) of this section as increased under subdivision (1) of this subsection shall, if such individual's annuity under section 2(a)(1) of this Act began to accrue in or before the year in which such first increase under the Social Security Act became effective, be reduced by the dollar amount by which that portion of the annuity provided such individual under subsection (a) of this section was increased, after any reduction under subsection (m) of this section; as a result of such increase or increases under the Social Security Act until the total dollar amount of such reduction or reductions equals 5 per centum of the annuity amount provided such individual under subsection (a), as reduced under subsection (m), prior to such first increase. In no case shall the reduction by reason of this paragraph operate to reduce such portion to an amount less than $10."

Mr. Coker is also entitled to a dual benefit windfall under section 3(h)(1) as follows:

"(h)(1) The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2(a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the amount by which (C) the sum of (i) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, if his service as an employee after December 31, 1936, and prior to January 1, 1975, were included in the term "employment" as defined in that Act and if he had no wages or self-employment income under that Act other than wages derived from such service as an employee, and (ii) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65)or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, exceeds (D) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act." (emphasis added).

Subsection 3(h)(5) provides cost-of-living increases in the dual benefit windfall provided by subsections 3(h)(1), (2), (3), or (4) from January 1, 1975 through the earlier of the beginning date of the annuity or January 1, 1982:

"(5) The amount computed under subdivision (1), (2), (3), or (4) of this subsection shall be increased by the same percentage, or percentages, as benefits under the Social Security Act are increased, or would have been increased

had there been no general benefit increases under the Social Security Act, pursuant to the automatic cost-of-living provisions of section 215(1) of that Act, during the period from January 1, 1975, to the earlier of the date on which the individual's annuity under section 2(a)(1) of this Act began to accrue or January 1, 1982."

Section 3(f)(2) (45 U.S.C. b(f)) of the Act is a "grandfather" clause which provides as follows:

"3(f)(2) If, in the case of an individual whose annuity under section 2(a)(1) of this Act began to accrue prior to January 1, 1983, the annuity (before any reduction due to such individual's entitlement to a monthly insurance benefit under the Social Security Act and disregarding any amount provided by subsection (h) of this section) plus the supplemental annuity to which such individual is entitled for any month under this Act, together with the annuity, if any, of the spouse's entitlement to a wife's or hsuband's insurance benefit under the Social Security act and disregarding any amount provided by section 4(e) of this Act, before any reduction under the provisions of section 2(f) of this Act, is less than the total amount which would have been payable to such individual and his spouse for such month, on the basis of the individual's compensation and years of service, under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974, disregarding for purposes of the computations for any month after December 31, 1974, in excess of one-twelfth of the maximum annual taxable "wages" (as defined in section 3121 of the Internal Revenue Code of 1954) for the calendar year 1974, the annuity of such individual and the annuity of such spouse, if any, shall be increased, without regard to the provisions of subdivision (1) of this subsection, proportionately so as to equal such total amount. For the purpose of computing amounts under this subdivision, the Board shall have the authority to approximate the effect of the reductions prescribed by sections 3(a)(2) and 3(a)(3) of the Railroad Retirement Act of 1937. For purposes of computing amounts payable under the Railroad Retirement Act of 1937, any increases in the amounts determined under the first proviso of section 3(e) of such Act which would have become effective after December 31, 1974, shall be disregarded." (emphasis added).

SUMMARY AND EVALUATION OF THE EVIDENCE

Based on the appellant's income tax records and the testimony at the hearing, the referee found that his net earnings from self-employment were less than the earnings limitations for 1981, 1982, and 1983. After the hearing, Mr. Coker's annuity was recomputed by the bureau of retirement claims to remove the deductions for work, to remove the reduction for social security benefits because the appellant had withdrawn his social security application, and to restore the 15% reduction that had previously been applied to the windfall. Of the accrual due Mr. Coker, $4,464.00 was transferred to the Social Security Administration to repay them for the social security benefits previously paid.

The referee has reviewed the recomputations made in the appellant's annuity by the bureau of retirement claims and finds that his benefits was recomputed to pay him the correct amounts due him under the Railroad Retirement Act from May 1, 1981.

Mr. Coker believes that he is entitled to receive a railroad retirement annuity (including the windfall benefit component) with no reduction for social security entitlement.

The referee finds that Mr. Coker's belief is contrary to the express provisions of the Railroad Retirement Act as enacted by the Congress. Under the Railroad Retirement Act of 1937, the predecessor statute to the current law, an employee who worked in employment covered by the railroad retirement system and also in employment covered by the social security system could receive benefits under both systems. Because of the formula under which those benefits were computed, persons who split their employment between railroad and nonrailroad employment received benefits in excess of the amount they would have received had they not split their employment. This excess is referred to as a dual benefit.

An example of the "windfall" of dual benefits is given by the United States Supreme Court in footnote 1 of Fritz v. Railroad Retirement Board 449 U.S. 168, 101 S. Ct. 456 (1980):

> "For example, if ten years of either railroad or nonrailroad employment would produce a monthly benefit of $300, an additional 10 years of the same employment at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to say $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the railroad retirement benefit would also be $300, for a total benefit of $600.

> The $100 difference in the example constitutes the "windfall" benefit. See generally, S. Rep. No. 93-1163, pp. 2-3 (1974), U.S. Code Cong. & Admin. News 1974, p. 5702; H.R. Rep. No. 93-1345, pp. 2-3 (1974)."

In 1974, Congress restructured the railroad retirement system to eliminate dual benefits. Dual benefits or "windfall" benefits were preserved for certain employees who had a "vested" status. The amount of the windfall benefit was restricted, however, to the windfall amount the employee would have received as of December 31, 1974 or as of the time the employee left railroad service. Mr. Coker last worked in the railroad industry in 1971. He has been self-employed since he left the industry. Because self-employment does not break a "current connection", Mr. Coker qualified for a windfall benefit computed as of December 13, 1974.

The 1974 Act created a two tier system. The first tier or component of an employee's annuity is provided by section 3(a)(1) of the Act. That section provides that the gross benefit will be the amount of the social security benefit the employee would receive if all of his employment after 1936, railroad and nonrailroad, were combined and considered as earnings covered by the Social Security Act. In Mr. Coker's case, his gross tier I benefit, as of December 1, 1983, is $631.00. (631.80 rounded down to 631.00). That amount is based not only on his railroad earnings through 1971 but also on his social security earnings from 1965 to 1980. After reduction for age, his tier I is $504.80.

Section 3(m) of the Railroad Retirement Act expressly requires the amount computed under section 3(a), that is, the amount of the gross tie I benefit, be reduced by the amount of any monthly benefit payable under the Social Security Act. If Mr. Coker becomes entitled to a social security benefit, his tier I benefit will be reduced by the full amount of his social security benefit.

Section 3(b) of the Act provides the tier II benefit, a component based entirely on railroad earnings alone. Mr. Coker was entitled to a tier II benefit of $35.98. Effective December 1, 1983, however, Congress authorized a reduction in the tier II. This reduced Mr. Coker's tier II to $19.18.

Section 3(h) of the Railroad Retirement Act provides for payment of a windfall benefit, which replaces in part the reduction for social security entitlement in tier I. The windfall benefit in Mr. Coker's case restores the dual benefit he would have received as of December 1974. Mr. Coker's windfall was computed by taking the amount of the social security formula benefit he would have received based on his railroad earnings alone through December 31, 1974 (161.20) and adding to it the amount of the social security formula benefit that he would have received based on his social security earnings alone through December 31, 1974 (212.20) and subtracting from that total the amount

of the social security formula benefit he would have received based on combined railroad and social security earnings as of December 31, 1974 ($285.80). The sum of $161.20 plus $212.20 is $373.40. This figure reduced by $285.80 yields the dual benefit of $87.60 as of December 31, 1974. Section 3(h)(5) of the Act provides that the dual benefit shall be increased by the cost of living increases provided by the Social Security Act from January 1, 1975 to the earlier of the date on which the individual's annuity began to accrue or January 1, 1982. Since Mr. Coker's annuity began May 1, 1981, his dual benefit was increased from $87.60 to $142.61 by the cost of living increases due from January 1, 1975 to May 1, 1981. The Act clearly provides no cost of living increase in the dual benefit windfall after May 1, 1981, the beginning date of the annuity.

In summary, Mr. Coker's is entitled to a railroad retirement annuity, as of December 1, 1983, of $638.07. This consists of tier I of $504.80 tier II of $19.18, and the dual benefit windfall of $114.09.

The tier I benefit Mr. Coker receives is based on his combined railroad and social security earnings. If Mr. Coker again becomes entitled to social security benefits, the tier I must be reduced by the full amount of his social security benefit. To do otherwise is to give Mr. Coker 2 social security benefits based on the same earnings, in addition to the windfall benefit. There can be no doubt about Congress' intent as section 3(m) of the Act expressly requires the deduction of the social security benefit.

Congress provided a continuation of windfall benefits based only on earnings through December 31, 1974. Mr. Coker gets a windfall based on his earnings through December 31, 1974. He also received the cost-of-living increases on that windfall from January 1, 1975 through May 1, 1981. There is no provision in the statute to provide him further dual benefits. The Supreme Court of the United States in Fritz v. Railroad Retirement Board, 449 U.S. 166, 101 S. Ct. 453 (1980), upheld the constitutionality of the dual benefit windfall provisions of section 3(h) of the Act, (45 U.S.C. 231b(h).

At the hearing, part of the discussion focused on the "grandfather" clause in section 3(f)(2) of the Act. This subsection is quoted under the law and regulation section of the decision. This section compares the employee's annuity under the 1974 Act before any reduction for social security benefits and without consideration of the windfall, with the amount that would have been payable to the employee on railroad earnings alone under the 1937 Act as of December 31, 1974. Mr. Coker's applicable annuity rate as of December 1, 1983 is $523.98. This is the tier I amount of $504.80 (before reduction of any social security benefit) plus the tier II amount of $19.18. The referee has computed the amount that the employee would have received under the

1937 Act as of December 31, 1974 to be approximately $309.00 (after reduction for social security entitlement). Since Mr. Coker's 1974 Act rate is larger than his 1937 Act rate, he will continue to be paid under the 1974 Act rate. This will not change if Mr. Coker again becomes entitled to social security benefits because section 3(f)(2) clearly requires that the 1974 Act rate to be considered is the amount before deduction of the social security benefit.

No cost-of-living increases are payable on the 1937 Act rate since the section is clear that the 1937 Act rate to be considered is the rate "i in effect on December 31, 1974."

At the hearing, Mr. Coker argued that a Board informational pamphlet (T-1, printed 12-74) gives information which is not consistent with the above. The pamphlet states: "A grandfather clause guarantees that employees and their wives retiring during the eight years following the changeover date of January 1, 1975, will receive no less than the amounts that would have been payable under previous law, excluding social security benefits." As indicated above, Mr. Coker would have received about $309.00 under the previous law. Under the new law he receives $523.98. This is the only comparison the grandfather's clause allows. The pamphlet was misleading to Mr. Coker and this is regretable. The statute, however, is clear and the referee must apply the provisions of the statute as enacted by the Congress. The referee finds that the appellant is receiving the full amount payable to him under the Railroad Retirement Act.

FINDINGS

After careful consideration of the entire record, the appeals referee makes the following findings:

1. The appellant's net earnings from self-employment in the years 1981, 1982, and 1983 were less than the earnings limitations for those years and he is entitled to payment of his annuity for those years without deduction for work.

2. The appellant is receiving the correct amount of benefits under the provisions of the Railroad Retirement Act.

Grace Koester
Appeals Referee

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD

TRANSCRIPT OF BOARD ORDERS

I certify that the following is a true and correct transcript of Board Order Numbered 84-89 issued by the Board on October 22, 1984

(signed) Beatrice Ezerski
Secretary to the Board

B.O. 84-89

DECISION IN RAILROAD RETIREMENT ACT CLAIMS
DOCKET NO. 3196,
JAMIE E. Coker, R.R.B. No. A-721-10-9264

Each memberof the Board having reported that he had examined the record in the appeal of Jamie E. Coker from the decision of the appeals referee and had considered the evidence and argument presented therein, the Board unanimously renders the decision set forth in the opinion of the Board affirming the decision of the appeals referee.

-o-

A TRUE COPY

ATTEST:

Arlene C. Coker
Arlene C. Coker, Wife
Attorney-in-Fact

RAILROAD RETIREMENT BOARD

Appeal of Jamie E. Coker R.R.B. No. A-721-10-9264	)	Railroad Retirement Act Claims Appeal Docket No. 3196

The Board has reviewed the record in the appeal of Jamie E. Coker from the decision of the appeals referee and has considered the argument and evidence contained therein. The Board affirms and adopts the decision of the appeals refereee.

The appeal is denied.

(stamped) R. A. Gielow

(stamped) Earl Oliver

(stamped) C. J. Chamberlain

A TRUE COPY

ATTEST:

Arlene C. Coker

Arlene C. Coker, Wife
Attorney-in-Fact